

PUBLIC LAW BOARD NO. 5850

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

vs.

**BNSF RAILWAY
(Former ATSF Railway)**

Case No. 408 – Award No. 408 – Claimant: Jacobs
Carrier File No. 14-11-086
Organization File No. 190-13C2-113.CLM

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement commencing February 11, 2011, when Claimant, Leonard Jacobs (1734516), was dismissed for failure to follow procedure while operating the T-Rex causing the machine to collide with the vehicle directly behind it on January 19, 2011. The Carrier alleged violation of EI 23.1.4 Machine Operator Roles and Responsibilities and MOWOR 1.1.2 Alert and Attentive.
2. As a consequence of the violation referred to in part 1 the Carrier shall remove from the Claimant's record this discipline and he be reinstated with seniority, vacation, all rights unimpaired and wage loss commencing February 11, 2011, and continuing forward and/or otherwise made whole.

FINDINGS:

Public Law Board No. 5850, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

Claimant, Leonard Jacobs, was hired by the Carrier in 2007. On January 21, 2011, following a request by the Organization, the Carrier notified Claimant to attend an investigation to ascertain the facts and determine his responsibility, if any, for his alleged failure, on January 19, 2011, to follow procedure while operating the T-Rex on TRPX0017 on the Gallup Subdivision, causing the machine to collide with the vehicle directly behind it. The Notice recited that Claimant's conduct involved possible violation

of MOWOR 1.1.2 Alert and Attentive and EI 23.1.4 Machine Operator Roles and Responsibilities. Following the investigation, on March 7, 2011, the Carrier dismissed Claimant "effective immediately" for these violations.

The applicable Carrier rules provide:

Maintenance of Way Operating Rules

1.0 General Responsibilities

1.1.2 Alert and Attentive

Employees must be careful to prevent injuring themselves or others. They must be alert and attentive when performing their duties and plan their work to avoid injury.

Engineering Instructions

23.1.4 Machine Operator's Roles, Responsibilities and Expectations

A. Roles

- The Machine Operator safely operates equipment to optimize gang productivity and achieve a high standard of quality . . .

The underlying facts of this case are not in dispute. Claimant participated in a Carrier crane operator training class held in Kansas, following which he was afforded the opportunity to bid on the T-Rex crane. He received the position and the Carrier assigned Machine Operator Trainer Santiago E. Gonzales to physically train Claimant on the vehicle.

On January 19, 2011, Claimant's fourth day on the machine, while Mr. Gonzales was still assigned to train Claimant, the Carrier assigned Mr. Gonzales to operate another machine. Claimant continued to operate his machine on his own, and was traveling from a hy-railing mode to a work mode.

According to the testimony of several witnesses at the investigation, the proper procedure for such a move is for the operator to completely lower the front end so the rear tires are on the ground, lower the back end so the rubber tires are on the ground, and next put the guide wheels down. Claimant apparently put down the guide wheels first, which are free-rolling and have no independent brake. The vehicle only has brake capability when in hy-rail mode or on the rubber wheels.

Although Claimant attempted to stop the vehicle by pushing the brakes, he was unable to stop because the guide wheels were down. Therefore, the vehicle was in free roll, and, as it was on a grade, it rolled backwards and apparently collided with another vehicle. There were no details of the collision, or any damage reports, in the investigation record.

Carrier Production Manager Keith Valentine testified at the investigation that he believed Claimant understood that the guide wheels were freewheeling and not designed to brake. He acknowledged that Claimant was new to the machine at the time of the incident and had been assigned a trainer. However, he stated, Claimant had attended the training school in Kansas, where it was Mr. Valentine's understanding that the procedure had also been covered. Mr. Valentine also maintained that Mr. Gonzalez told him that he had gone over the proper procedure for this sort of move with Claimant. Therefore, Mr. Valentine concluded, in his opinion Claimant had been properly trained to travel the machine, and was aware of the proper sequence for stopping it.

Mr. Valentine acknowledged that he had never run the T-Rex crane, had never had any training on the machine, had never attended the crane training school and was not aware of its full curriculum. No materials were entered into evidence demonstrating the curriculum or content of the training class.

Traveling Mechanic Gregory DeLuca also testified at the investigation. He stated that he did not know if Claimant was aware of the proper procedure for the transition at issue but Claimant had been to crane school where operators are taught how to properly get on and off hy-rails. He, too, acknowledged that he had not yet attended that training class.

Mr. DeLuca further stated that the proper procedure is covered in the operator's manual which is maintained in the cab of the machine, and the procedure is also denoted on placards on the door entry to the machine and on the window to the right of the operator's seat. Therefore, he stated, information as to the proper procedure is readily available in the machine. No relevant sections of the operator's manual, or depictions of the placards, were entered into evidence.

Mr. Gonzales also testified at the investigation, explaining that he arrived after the incident happened and did not see what had occurred. He stated that he was supposed to be training Claimant, but he had been put on a different machine so he was not available to guide Claimant and help him out. He testified that based upon his observations he believed Claimant was capable of operating the machine safely, but Claimant was not fully aware of transition from the hy-rail to the rubber wheels.

Mr. Gonzales stated that he did not believe this procedure was so important that it was one of the first things he would discuss with Claimant, because at the beginning Mr. Gonzales did the traveling. He stated that he had not relayed to Claimant how critical it was not to have the guide wheels freewheeling and the need to have the rubber or hy-rail wheels make contact. He explained that on the two occasions prior to the incident when Claimant had traveled the machine Mr. Gonzales was on the ground, taking him through the steps, and there was no mishap. He stated that it was his job to be Claimant's trainer, but he was placed on another machine that day, which was not his job, and therefore there was a "mess up." He stated that when he was placed on the other machine he informed the foreman that it was not his job, as he was supposed to train Claimant, but the foreman replied that Claimant had hy-railed "a couple of times."

Mr. Gonzales further testified that he did not feel that at the time of the incident Claimant understood that the guide wheels were freewheeling and that if he did not have contact with the other wheels, the hy-rails or the rubber, the machine would be freewheeling. That was a critical part of the operation, he stated, and he had not discussed that particular point with Claimant until after the incident.

Mr. Gonzales testified that he had attended the crane training school, and the procedure at issue here was not discussed during that training. He stated that he could not say whether there was anything in the operator's machine or other guides in the machine that would specify the proper procedure, because he had been hy-railing for years, to the point that it was common sense for him.

Mr. Gonzales testified that when he first learned to operate the machine that he found out the guide wheels are not designed to brake the same way Claimant did, that is, he had a similar incident where he rolled and panicked, and it threw him off because he believed he had the qualifications to run the machine.

Assistant Foreman John Ray testified at the investigation that all he knew about the incident was that Claimant put the guide wheels down and the machine rolled back into the Chemtron. He stated that he was aware that Claimant was still in training and the individual who was supposed to be training him was operating another machine at the time. He stated that he knew Claimant still needed training, although he believed he could run the machine, but he was lacking experience behind the controls as he had only been on a couple of days where he actually ran the machine. He stated that Claimant had spent perhaps only four hours on the machine. With respect to setting the guide wheels down before the rubber wheels made contact with the ground and transition from hy-rails to the rubber wheels, he stated that it was something Claimant should have known before even attempting to train on the machine but he did not know if Claimant actually knew it. He stated that he had not seen Claimant attempt to make this transition before.

Claimant testified at the investigation that prior to the incident he had operated the T-Rex only twice, and that by the time of the investigation he knew that there was a specific procedure for transitioning from travel to work mode but he was not aware of it at the time of the incident. He stated that he had felt he was qualified to drive the vehicle, but did not know the procedure and did not realize at the time that the manner in which he performed it was unsafe. He explained that he just did not realize that it would be a problem and he would not have brakes, especially since he was on an incline.

Claimant denied that the operating manual and stickers which would guide an operator in the proper procedure were in the vehicle, stating that there was nothing that would indicate the proper sequence for the move he made. He explained that there was a manual but that it did not indicate a step-by-step procedure. Claimant stated that he believed he was safe to drive the machine, but was not trained in the transition and did not realize there would be a problem or he would not have attempted the maneuver.

Claimant acknowledged that he had attended the crane training class but maintained that there had been no training concerning transitioning from travel to work mode.

The Carrier's Policy for Employee Performance Accountability (PEPA), provides that an employee involved in a serious incident, as enumerated in the policy's Appendix B, will receive a 30-day record suspension, with a 12 or 36-month review period depending upon the employee's previous record. A second serious incident within the review period can subject the employee to dismissal. Appendix B lists as serious violations numerous safety infractions as well as "other serious violations" of Carrier rules. Claimant's personal record shows a Level S, 10-day actual suspension, with a 12-month review period, issued May 30, 2008, for violating the Carrier's Violence in the Workplace Policy. It also shows a 30-day record suspension, with a 36-month review period, issued August 26, 2010 for causing a machine collision.

The Carrier first notes that although the claim seeks that Claimant be compensated for all wage loss commencing February 11, 2011, his payroll record shows that he worked until March 3, 2011. Moreover, the Carrier states, the investigation was held on February 11, 2011 rather than July 15, 2010 as alleged by the Organization.

On the merits, the Carrier asserts that the case is not complicated. Indeed, the Carrier states, the Organization does not dispute that Claimant's failure to properly operate his equipment caused an accident. Instead, the Carrier points out, the Organization's only argument is that Claimant was not qualified in the machine's operation. However, the Carrier asserts, Claimant was not in fact operating the machine, but was merely "traveling," or moving, it. The Carrier notes the testimony of Roadmaster Valentine that, in his opinion, Claimant was sufficiently trained to move the machine. Moreover, the Carrier states, both Mr. Valentine and Traveling Mechanic Greg Deluca testified that traveling procedures for this machine are taught at the crane school in Kansas City, which Claimant attended. The Carrier notes that Mr. Valentine explained that Claimant should have been aware of the proper operation sequence. Therefore, the Carrier states, the violation has been proven by substantial evidence.

As for the penalty, the Carrier asserts that Claimant's dismissal was appropriate given the seriousness of his offense and personal record. That record, the Carrier notes, shows that this was Claimant's third Level S serious violation within a 36-month period, while the PEPA provides that even two such violations within that period may subject an employee to dismissal. The Carrier urges that the claim be denied.

The Organization asserts that the discipline assessed against Claimant is extreme, unwarranted, unjustified and not supported by the flagrant abuse of any Carrier rule. The facts of this case show, the Organization urges, that Claimant violated no Carrier rules, but rather operated his vehicle in accordance with the training he received at the Carrier's Technical Training Center and by the field trainer working with him on the T-Rex Crane. In particular, the Organization notes, the record, especially the testimony of his assigned trainer, demonstrates that Claimant had received no training concerning the potential hazard he could encounter when he attempted to transition from hy-rail travel to work

mode on a grade. Claimant, the Organization asserts, had received only two to four hours of "seat time" on the T-Rex Crane and, contrary to plans, had been left alone without his trainer. This lack of training, rather than any failure by Claimant, was, the Organization urges, responsible for the incident.

Moreover, the Organization states, the Carrier provided no evidence of contact between the T-Rex Crane operated by Claimant and any other machine or vehicle. For all of these reasons, the Organization concludes that the Carrier failed to provide substantial evidence to support the charges against Claimant and, even if it had, the discipline assessed is extreme and unwarranted in relation to the asserted offense. The Organization therefore urges that the claim be sustained.

We have carefully reviewed the record in its entirety, and conclude that the Carrier has failed to meet its burden of proving Claimant's guilt by substantial evidence. There is no dispute that Claimant failed to perform the proper sequence of moves for transitioning his T-Rex crane from hy-rail to work mode, nor is there any dispute that as a result the machine resulting went into a free roll and, apparently, had some sort of collision with another vehicle. We agree with the Organization, however, that the issue in this case is whether Claimant was properly trained to perform this move, such that he can be held accountable for his failure to do so. On this record, we must conclude that he was not.

The Carrier first bases its case that Claimant was sufficiently trained on the testimony of two Carrier witnesses that the matter was covered in a crane training class Claimant had attended. However, neither of those witnesses had ever actually attended the class, and neither demonstrated sufficient familiarity with the curriculum to back up their assertions. More importantly, the two witnesses who had attended the training, Claimant and his trainer, testified that this procedure was not covered in the training. No written documentation or curriculum was introduced to support the Carrier's assertions as to the content of the training. We do not question the sincerity of the Carrier witnesses' testimony as to what they believed would have been covered, but it does not appear that there was a factual foundation for their beliefs. The Carrier also asserted that the operating manual and placards in the vehicle denoted the step-by-step procedure, points Claimant denied, but although such written materials must have been readily available if they were in fact present, they were not provided during the investigation. We therefore find these points not proven by substantial evidence.

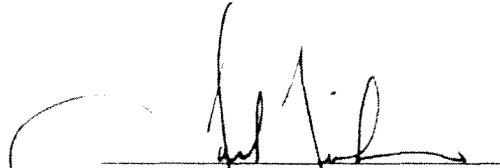
Moreover, even if the matter had been addressed in the training, the Carrier obviously did not believe it was sufficient to allow an employee to simply operate a vehicle, as it assigned Claimant a trainer to help him become proficient. The Carrier chose to remove the trainer on Claimant's fourth day on the vehicle, during a time when he had very little experience on the vehicle and was still in training, and left him to function on his own. His trainer testified that he had walked Claimant through this procedure only twice, and had not informed him that the guide wheels were freewheeling and he needed to have either the hy-rail or the rubber wheels on the ground. Moreover,

the trainer acknowledged that he had committed exactly the same error when he first began operating the machine.

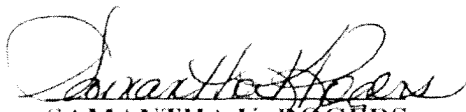
In conclusion, while perhaps Claimant could have been more skillful, we find that the Carrier has failed to meet its burden of proving its primary assertion, that Claimant was sufficiently trained to properly make the move at issue and thus committed a serious offense by failing to make the move properly. We order Claimant's dismissal overturned and his personal record corrected according, that he be returned to work and made whole in accordance with the parties' Agreement.

AWARD

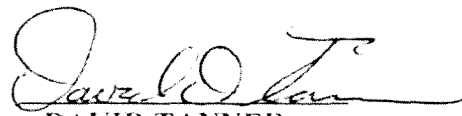
Claim sustained. The Carrier is directed to comply with this Award within 45 days.



DAN NIELSEN
Neutral Member



SAMANTHA K. ROGERS
Carrier Member



DAVID TANNER
Organization Member

Dated this *28* day of *Sep*, 2012.